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COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37 and 38

RIN 3038-AD18

Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade

AGENCY: Commodity Futures Trading Commission.

ACTION: Further notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (“Commission”) is proposing regulations that establish a process for a designated contract market (“DCM”) or swap execution facility (“SEF”) to make a swap “available to trade” as set forth in new Section 2(h)(8) of the Commodity Exchange Act (“CEA”) pursuant to Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Only comments pertaining to the regulations proposed in this document will be considered as part of this further notice of proposed rulemaking (“Notice”).

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN number 3038-AD18 and Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, by any of the following methods:

- Agency website, via its Comments Online process at <http://comments.cftc.gov>.

Follow the instructions for submitting comments through the website.

- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Bella Rozenberg, Associate Director, Division of Market Oversight ("DMO"), 202-418-5119, brozenberg@cftc.gov, Amir

Zaidi, Special Counsel, DMO, 202-418-6770, azaidi@cftc.gov, or Nhan Nguyen, Attorney Advisor, DMO, 202-418-5932, nnguyen@cftc.gov, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION

I. Background

The Dodd-Frank Act¹ requires that swap transactions subject to the clearing requirement² must be executed on a DCM or SEF,³ subject to certain exceptions. Under Section 2(h)(8)(B) of the CEA, the exceptions to the trade execution requirement are if no board of trade⁴ or SEF “makes the swap available to trade” or the related transaction is subject to the clearing exception under Section 2(h)(7) (i.e., the end-user exception).⁵

On January 7, 2011, the Commission published proposed rules, guidance, and acceptable practices (“SEF NPRM”) to implement certain statutory provisions for SEFs

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

² Section 723(a)(3) of the Dodd-Frank Act amended the CEA to add a clearing requirement. This clearing requirement, under new Section 2(h)(1)(A) of the CEA, provides that “[i]t shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization that is registered under this Act or a derivatives clearing organization that is exempt from registration under this Act if the swap is required to be cleared.”

³ Section 723(a)(3) of the Dodd-Frank Act amended the CEA to add a trade execution requirement. This trade execution requirement, under new Section 2(h)(8)(A) of the CEA, provides that with respect to transactions involving swaps subject to the clearing requirement of Section 2(h)(1), “counterparties shall (i) execute the transaction on a board of trade designated as a contract market under section 5; or (ii) execute the transaction on a swap execution facility registered under 5h or a swap execution facility that is exempt from registration under section 5h(f) of this Act.”

⁴ The logical interpretation of the phrase “board of trade” in Section 2(h)(8)(B) means a board of trade designated as a contract market given such reference in Section 2(h)(8)(A).

⁵ Section 2(h)(7) of the CEA provides an exception to the clearing requirement (“the end-user exception”) if one of the counterparties to a swap (i) is not a financial entity, (ii) is using the swap to hedge or mitigate commercial risk, and (iii) notifies the Commission how it generally meets its financial obligations associated with entering into a non-cleared swap.

enacted by Title VII of the Dodd-Frank Act.⁶ In the SEF NPRM, the Commission proposed, among other rules, § 37.10 related to implementation of the available to trade provision under Section 2(h)(8) of the CEA.⁷ Proposed § 37.10 requires each SEF to conduct an annual review and assessment of whether it has made a swap available for trading and to provide a report to the Commission regarding its assessment.⁸ In its review and assessment, the SEF may consider the frequency of transactions, open interest, and any other factor requested by the Commission.⁹ Proposed § 37.10 also requires that all SEFs are required to treat a swap as made available for trading, if at least one SEF has made the same or an economically equivalent swap available for trading.¹⁰

The SEF NPRM sought general public comment regarding the meaning of the phrase “made available for trading.”¹¹ The Commission also asked for comment on two specific questions: (1) whether SEFs should consider the number of market participants trading a particular swap, and, if so, whether there should be a required minimum number of participants (e.g., two or three participants); and (2) whether SEFs should consider any other factors or processes to make the determination that swaps are made available for

⁶ Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214 (Jan. 7, 2011).

⁷ 76 FR at 1241.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ 76 FR at 1222. Comments on all aspects of the SEF NPRM were due by March 8, 2011. On May 4, 2011, the Commission reopened the SEF NPRM’s comment period through June 3, 2011, as part of the global extension of comment periods for various rulemakings implementing the Dodd-Frank Act to allow the public additional time to comment on the proposed new regulatory framework for swaps. See Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274 (May 4, 2011).

trading.¹² The Commission received 26 comments on the proposed “available to trade” process.¹³ The Commission has considered these comments, which are discussed below in the next section, in developing this Notice.

On December 22, 2010, the Commission also published proposed rules, guidance, and acceptable practices (“DCM NPRM”) to implement certain statutory provisions for DCMs enacted by Title VII of the Dodd-Frank Act.¹⁴ The DCM NPRM did not establish any obligation for DCMs under Section 2(h)(8) of the CEA, but it did establish certain swap reporting obligations.¹⁵

II. Notice

A. Introduction

In this Notice, the Commission is proposing regulations to establish a process for a DCM or SEF to make a swap “available to trade” under Section 2(h)(8) of the CEA.¹⁶ The proposed regulations would be included in proposed parts 37 and 38 of the Commission’s regulations to implement the available to trade provision in Section 2(h)(8) of the CEA.

¹² 76 FR at 1222.

¹³ These comments are available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=955>.

¹⁴ Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (Dec. 22, 2010).

¹⁵ See e.g., proposed Sections 38.8, 38.10, and 38.451. Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (Dec. 22, 2010).

¹⁶ Sections 5(d)(1) and 5h(f)(1) of the CEA require DCMs and SEFs, respectively, to comply with any requirement that the Commission may impose by rule or regulation pursuant to Section 8a(5) of the CEA, 7 U.S.C. 12a(5), which authorizes the Commission to promulgate such regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. In addition, Section 721(b) of the Dodd-Frank Act provides the Commission with authority to adopt rules to define “[any] term included in an amendment to the Commodity Exchange Act ... made by [the Dodd-Frank Act].”

B. Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the CEA

1. Procedure to Make a Swap Available to Trade – Proposed §§ 37.10(a) and 38.12(a)

a. Comments Regarding Available to Trade Process

A key theme to emerge from the SEF NPRM comments is that the Commission should establish a process for determining when a swap is available to trade that includes greater Commission involvement.¹⁷ For example, one commenter suggested that a SEF certify to the Commission those swaps that qualify as available to trade and that, following a public notice and comment period, the Commission confirm (or reject) the SEF's certification.¹⁸ Similarly, another commenter recommended that a SEF submit to the Commission those swaps it determines to be available to trade and that the Commission review the submission and provide at least a thirty-day public comment period regarding its decision.¹⁹ Another commenter encouraged the Commission to institute a process through which market participants could petition the Commission to review the appropriateness of a SEF's determination that a swap is available to trade.²⁰

Some commenters requested that the Commission determine whether a particular swap is available to trade²¹ while other commenters requested that SEFs make this

¹⁷ E.g., Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18-19; Letter from Kevin Gould, Markit, dated Mar. 8, 2011 at 3; Letter from Andrew Ertel, Evolution Markets Inc., dated Mar. 8, 2011 at 9; Letter from Wholesale Market Brokers' Association, Americas, dated Mar. 8, 2011 at 17-18.

¹⁸ Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 19.

¹⁹ Letter from Kevin Gould, Markit, dated Mar. 8, 2011 at 3.

²⁰ Letter from Andrew Ertel, Evolution Markets Inc., dated Mar. 8, 2011 at 9.

determination.²² Many commenters that supported a Commission determination noted that SEFs may have incentives to prematurely make certain swaps available to trade in order to mandate trading in these instruments on or through SEFs.²³ The commenters that supported a SEF determination stated that SEFs should have some discretion whether a swap is made available to trade.²⁴

In light of these comments and the fact that the DCM NPRM did not establish any obligation for DCMs under Section 2(h)(8) of the CEA, the Commission has determined to issue this Notice.

b. Rule Submission Filing Procedure – Proposed §§ 37.10(a) and 38.12(a)

Proposed §§ 37.10(a) and 38.12(a) set forth the filing procedure that SEFs and DCMs would utilize in order to demonstrate that a swap is available to trade. Under this proposed procedure, a DCM or SEF would initially determine that a swap is available to trade. The Commission views such determination as a trading protocol issued by a DCM or SEF. Such trading protocol falls under the definition of a rule under § 40.1 of the

²¹ E.g., Letter from Craig Donohue, CME Group Inc., dated Mar. 8, 2011 at 10; Letter from Patrick Durkin, Barclays Capital, dated Mar. 8, 2011 at 11; Letter from Kevin Budd and Todd Lurie, MetLife, dated Mar. 8, 2011 at 4; Letter from Richard McVey, MarketAxess Corporation, dated Mar. 8, 2011 at 27; Letter from Timothy Cameron, Securities Industry and Financial Markets Association Asset Management Group, dated Mar. 8, 2011 at 11; Letter from Richard Whiting, Financial Services Roundtable, dated Mar. 8, 2011 at 8; Letter from R. Martin Chavez, Goldman, Sachs & Co, dated Mar. 8, 2011 at 3; Letter from Warren Davis, Sutherland Asbill & Brennan LLP, on behalf of the Federal Home Loan Banks, dated Jun. 3, 2011 at 14; Letter from Wayne Pestone, FX Alliance Inc., dated Nov. 4, 2011 at 9-10.

²² E.g., Letter from Wholesale Market Brokers' Association, Americas, dated Mar. 8, 2011 at 17-18; Letter from Lee Olesky and Douglas Friedman, Tradeweb Markets LLC, dated Mar. 8, 2011 at 8-9; Letter from Coalition for Derivatives End-Users, dated Mar. 8, 2011 at 7-8.

²³ E.g., Letter from Craig Donohue, CME Group Inc., dated Mar. 8, 2011 at 10; Letter from Patrick Durkin, Barclays Capital, dated Mar. 8, 2011 at 11; Letter from Kevin Budd and Todd Lurie, MetLife, dated Mar. 8, 2011 at 4; Letter from Timothy Cameron, Securities Industry and Financial Markets Association Asset Management Group, dated Mar. 8, 2011 at 11; Letter from Wayne Pestone, FX Alliance Inc., dated Nov. 4, 2011 at 9-10.

²⁴ E.g., Letter from Wholesale Market Brokers' Association, Americas, dated Mar. 8, 2011 at 17-18; Letter from Lee Olesky and Douglas Friedman, Tradeweb Markets LLC, dated Mar. 8, 2011 at 8-9; Letter from Coalition for Derivatives End-Users, dated Mar. 8, 2011 at 7-8.

Commission's regulations.²⁵ Therefore, pursuant to Section 5c(c) of the CEA, DCMs and SEFs would be required as "registered entities"²⁶ to submit make available to trade determinations to the Commission, either for approval or self-certification, pursuant to the filing procedures of part 40 of the Commission's regulations.²⁷

Specifically, under this proposal, a DCM or SEF would be required to submit its determination that a swap is available to trade under § 40.5 or § 40.6 of the Commission's regulations. Under § 40.5, a registered entity may request Commission approval of a new rule prior to its implementation.²⁸ Section 40.5(a) requires, among other things,²⁹ that a registered entity that requests Commission prior approval provide an explanation and analysis of that proposed rule and its compliance with applicable

²⁵ Section 40.1(i) defines rule as "any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted."

²⁶ The term "registered entity" is defined in the CEA to include both DCMs and SEFs. See Section 1a(40) of the CEA, 7 U.S.C. 1a(40).

²⁷ See Sections 40.5 and 40.6 and Provisions Common to Registered Entities, 76 FR 44776 (Jul. 27, 2011). The Commission notes that the proposed procedures to make a swap available to trade are different than the procedures to list a swap for trading. A DCM or SEF may list a swap for trading by complying with the certification or approval procedures under §§ 40.2 or 40.3 of the Commission's regulations. Under the certification procedures of § 40.2, a DCM or SEF may list a product on the business day following the Commission's receipt of the submission, if received by the open of business. Under the approval procedures of § 40.3, a product is deemed approved by the Commission 45 days after receipt by the Commission or at the conclusion of an extended review period. A DCM or SEF may list the submitted product at that time. The Commission notes, however, the mere listing or trading of a swap on a DCM or SEF would not mean that the swap is available to trade within the meaning of Section 2(h)(8) of the CEA. The Commission further notes that a DCM or SEF must submit an available to trade filing at the same time or after submitting a filing under Sections 40.2 or 40.3.

²⁸ Section 40.5(a).

²⁹ E.g., Section 40.5(a)(6) requires a registered entity to post notice and a copy of the rule submission on its website, Section 40.5(a)(7) requires a registered entity to provide additional information which may be beneficial to the Commission in analyzing a new rule, and Section 40.5(a)(8) requires a registered entity to provide in the rule submission a brief explanation of any substantive opposing views.

provisions of the CEA, including core principles, and the Commission's regulations thereunder.³⁰ This explanation and analysis would detail the manner in which the SEF or DCM considered the factors under proposed §§ 37.10(b) or 38.12(b). Sections 40.5(c) and (d) provide the Commission a 45-day review period, which may be extended for an additional 45 days in specified circumstances.³¹ At any time during its review, the Commission may notify the registered entity that it will not, or is unable to, approve a rule because it is inconsistent or appears to be inconsistent with the CEA or the Commission's regulations.³²

Similar to the approval procedures under § 40.5, if a registered entity chooses to submit its available to trade determination under the certification procedures of § 40.6, then the registered entity must provide to the Commission an explanation and analysis of the proposed rule and a certification that the rule complies with the CEA and the Commission's regulations thereunder.³³ As in § 40.5, the explanation and analysis would detail the manner in which the SEF or DCM considered the factors under proposed §§ 37.10(b) or 38.12(b). Sections 40.6(b) and (c) provide the Commission 10 business days to review a rule before it is deemed certified and can be made effective, unless the

³⁰ Section 40.5(a)(5). This provision also requires, if applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the registered entity's framework of self-regulation.

³¹ Sections 40.5(c) and (d). In determining whether to extend the review period, the Commission will consider whether the proposed rule raises novel or complex issues, the submission is incomplete, or the requestor does not respond completely to Commission questions in a timely manner. Section 40.5(d)(1).

³² Section 40.5(e).

³³ Section 40.6(a). Section 40.6(a)(2) requires a registered entity to post notice and a copy of the rule submission on its website, Section 40.6(a)(7)(vi) requires a registered entity to provide in the rule submission a brief explanation of any substantive opposing views, and Section 40.6(a)(8) requires a registered entity to provide, if requested by Commission staff, additional evidence, information, or data that may be beneficial to the Commission in conducting due diligence of the filing.

Commission issues a stay of the certification for additional 90 days from the date of notification to the registered entity.³⁴ If the Commission issues a stay of certification, then it must provide a 30-day public comment period for the proposed rule.³⁵ During a stay period, the Commission may notify the registered entity that it objects to the proposed certification on the grounds that the proposed rule is inconsistent with the CEA or the Commission's regulations.³⁶

Under this Notice, if the Commission either approves a DCM's or SEF's rule providing that a swap is available to trade or permits a certified available to trade filing to become effective, then the swap involved would be deemed available to trade.³⁷ If that swap also is subject to the clearing requirement, pursuant to CEA Section 2(h)(8), the swap must be executed pursuant to the rules of a DCM or SEF.³⁸ Under this Notice, until such time, the swap is not subject to the CEA Section 2(h)(8) trade execution requirement.

³⁴ Sections 40.6(b) and (c). In determining whether to stay a certification, the Commission will consider whether the rule presents novel or complex issues, is accompanied by inadequate explanation, or is potentially inconsistent with the CEA. Section 40.6(c)(1).

³⁵ Section 40.6(c)(2).

³⁶ Section 40.6(c)(3).

³⁷ See proposed §§ 37.10(c) and 38.12(c). Under these sections, if a SEF or DCM makes a swap available to trade, all other SEFs and DCMs listing or offering for trading such swap and/or any economically equivalent swap, shall make those swaps available to trade for purposes of the trade execution requirement. The Commission notes that if a DCM or SEF makes a swap available to trade, these proposed provisions would not require other DCMs and SEFs to list or offer that swap, or an economically equivalent swap, for trading.

³⁸ See Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sep. 20, 2011), for the time frame in which a swap would be subject to the trade execution requirement. The Commission notes that the available to trade determination may precede the clearing requirement and vice versa; however, the trade execution requirement would not be in effect until the clearing requirement takes effect.

The Commission views the proposed procedure for DCMs and SEFs to make a swap available to trade as a balanced approach whereby a DCM or SEF – the facilities that may be most familiar with the trading of these swaps – has responsibility to make a swap available to trade, while the Commission has a role in reviewing such determination. Additionally, this proposed procedure is responsive to comments that the Commission should establish a process for DCMs and SEFs to make a swap available to trade, with Commission involvement in the determination. The Commission notes that as it gains experience with its oversight of swaps markets, it may decide, in its discretion, to determine that a swap is available to trade.

2. Factors to Consider to Make a Swap Available to Trade – Proposed §§ 37.10(b) and 38.12(b)

a. Comments Regarding Factors to Consider

Many commenters to the SEF NPRM supported a liquidity requirement for a determination that a swap is available to trade.³⁹ One commenter, for example, stated that “Congress intended for the Commission[] to establish a higher liquidity threshold for mandatory execution than for mandatory clearing, and that a swap is not ‘available to trade’ merely because it is listed on a DCM/exchange or SEF.”⁴⁰ However, other commenters said that a minimum level of liquidity should not be required for a

³⁹ E.g., Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18; Letter from Kevin Gould, Markit, dated Mar. 8, 2011 at 2; Letter from Jeremy Barnum and Don Thompson, J.P. Morgan, dated Mar. 8, 2011 at 9; Letter from Robert Pickel and Kenneth Bentsen, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association, dated Mar. 8, 2011 at 8; Letter from R. Martin Chavez, Goldman, Sachs & Co., dated Mar. 8, 2011 at 3; Letter from Craig Donohue, CME Group Inc., dated Mar. 8, 2011 at 9.

⁴⁰ Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18.

determination that a swap is available to trade.⁴¹ One commenter noted that a determination that a swap is available to trade should apply to each swap that is subject to the clearing requirement and that the determination should not require a minimum level of trading activity.⁴²

Many commenters also recommended specific liquidity factors that a SEF should consider in determining whether a swap is available to trade such as trade frequency and average transaction size, bid/offer spreads, number and types of market participants, and volume.⁴³ Some commenters further suggested that the Commission set mandatory objective and transparent liquidity factors based upon an empirical analysis of swap trading data.⁴⁴ One commenter stated that the Commission should undertake empirical analyses of swap market liquidity to set specific quantitative thresholds for metrics, such as minimum average daily trading volume and number of transactions.⁴⁵ Another commenter asserted that objective measures for determining when a swap is available to trade will provide for a consistent and meaningful assessment.⁴⁶

⁴¹ Letter from Dennis Kelleher, Better Markets, Inc., dated Mar. 8, 2011 at 10-11; Letter from Wholesale Market Brokers' Association, Americas, dated Mar. 8, 2011 at 17-18; Letter from Ian K. Shepherd, Alice Corporation, dated May 31, 2011 at 7.

⁴² Letter from Dennis Kelleher, Better Markets, Inc., dated Mar. 8, 2011 at 10-11.

⁴³ E.g., Letter from Kevin Gould, Markit, dated Mar. 8, 2011 at 2; Letter from Craig Donohue, CME Group Inc., dated Mar. 8, 2011 at 10; Letter from John Gidman, Association of Institutional Investors, dated Jun. 10, 2011 at 3; Letter from Mark Vonderheide and Robert Creamer, Geneva Energy Markets, LLC, dated Jul. 29, 2011 at 2; Meeting between Commission staff and Evolution Markets and Ogilvy Government Relations, dated Jan. 19, 2011.

⁴⁴ E.g., Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18; Letter from Ben Macdonald, Bloomberg L.P., dated Jun. 3, 2011 at 3; Letter from Stuart Kaswell, Managed Funds Association, dated Mar. 8, 2011 at 3-4; Letter from American Benefits Council and Committee on Investment of Employee Benefit Assets, dated Mar. 8, 2011 at 4-5.

⁴⁵ Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18.

b. Factors to Consider – Proposed §§ 37.10(b) and 38.12(b)

Proposed §§ 37.10(b) and 38.12(b) state that, to make a swap available to trade, for purposes of Section 2(h)(8) of the CEA, a SEF or DCM shall consider, as appropriate, the following factors with respect to such swap: (1) Whether there are ready and willing buyers and sellers; (2) The frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) The trading volume on SEFs, DCMs, or of bilateral transactions; (4) The number and types of market participants; (5) The bid/ask spread; (6) The usual number of resting firm or indicative bids and offers; (7) Whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; or (8) Any other factor that the SEF or DCM may consider relevant.⁴⁷ No single factor would be dispositive, as the DCM or SEF may consider any one factor or several factors to make a swap available to trade. The Commission notes that, as the swaps markets evolve and the Commission gains experience with overseeing these markets, it may consider setting objective factors based upon an empirical analysis of swap trading data in a future rulemaking.

3. Economically Equivalent Swap – Proposed §§ 37.10(c) and 38.12(c)

a. Comments Regarding Economically Equivalent Swaps

In the SEF NPRM, the Commission proposed that all SEFs are required to treat a swap as “made available for trading,” if at least one SEF has made the same or an economically equivalent swap available for trading.⁴⁸ Many commenters to the SEF

⁴⁶ Letter from Ben Macdonald, Bloomberg L.P., dated Jun. 3, 2011 at 3.

⁴⁷ As noted above, the mere listing or trading of a swap on a DCM or SEF does not mean that the swap is available to trade.

⁴⁸ 76 FR 1241.

NPRM requested that the Commission clarify the term economically equivalent swap and some commenters provided recommendations as to how it should be defined.⁴⁹ Several commenters recommended a stringent fungibility test to determine whether a particular swap is economically equivalent to one made available to trade on another SEF, such that a derivatives clearing organization (“DCO”) would recognize the swaps as mutually off-settable without residual market risk.⁵⁰ Another commenter suggested that only identical swaps should be made available to trade.⁵¹ Furthermore, one commenter cautioned that without a stringent fungibility test there may be unintended consequences, including unduly concentrating trading volume on a single SEF or preventing participants from entering into customized swaps in the same general swap category.⁵²

b. Economically Equivalent Swap – Proposed §§ 37.10(c) and 38.12(c)

Under proposed §§ 37.10(c)(1) and 38.12(c)(1), upon a determination that a swap is available to trade, all other SEFs and DCMs listing or offering for trading such swap and/or any economically equivalent swap, must make those swaps available to trade for purposes of the trade execution requirement set forth in Section 2(h)(8) of the CEA. The Commission notes that if a DCM or SEF makes a swap available to trade, these proposed

⁴⁹ Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 19; Letter from Robert Pickel and Kenneth Bentsen, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association, dated Mar. 8, 2011 at 9; Letter from Wholesale Market Brokers’ Association, Americas, dated Mar. 8, 2011 at 18; Letter from Richard Whiting, Financial Services Roundtable, dated Mar. 8, 2011 at 7; Letter from Patrick Durkin, Barclays Capital, dated Mar. 8, 2011 at 11.

⁵⁰ Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 19; Letter from Robert Pickel and Kenneth Bentsen, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association, dated Mar. 8, 2011 at 9; Letter from Patrick Durkin, Barclays Capital, dated Mar. 8, 2011 at 11.

⁵¹ Letter from Richard Whiting, Financial Services Roundtable, dated Mar. 8, 2011 at 7.

⁵² Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 19.

provisions would not require other DCMs and SEFs to list or offer that swap, or an economically equivalent swap, for trading.

In this Notice, the Commission is proposing a definition for the term “economically equivalent swap.” Proposed §§ 37.10(c)(2) and 38.12(c)(2) define the term “economically equivalent swap” as a swap that the SEF or DCM determines to be economically equivalent with another swap after consideration of each swap’s material pricing terms.

4. Annual Review of Available to Trade Determinations – Proposed §§ 37.10(d) and 38.12(d)

a. Comments Regarding Annual Review

Several commenters to the SEF NPRM supported a Commission review requirement for swaps that have been determined to be available to trade.⁵³ One commenter asserted that SEF available to trade determinations should be revisited and reconsidered because the liquidity of swaps can experience significant changes over time and can dry up completely in some circumstances.⁵⁴ Similarly, another commenter stated that SEFs should revisit available to trade determinations on a quarterly basis because the level of liquidity for a swap can vary significantly over time.⁵⁵

b. Annual Review – Proposed §§ 37.10(d) and 38.12(d)

⁵³ E.g., Letter from Kevin Gould, Markit, dated Mar. 8, 2011 at 2; Letter from Dexter Senft, Morgan Stanley, dated Mar. 2, 2011 at 4; Letter from Stuart Kaswell, Managed Funds Association, dated Mar. 8, 2011 at 4; Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18-19.

⁵⁴ Letter from Kevin Gould, Markit, dated Mar. 8, 2011 at 2.

⁵⁵ Letter from Edward Rosen, Cleary Gottlieb Steen & Hamilton LLP, on behalf of certain dealers, dated Apr. 5, 2011 at 18-19.

The Commission is proposing to retain the annual review and assessment requirement set forth in the SEF NPRM and also require that DCMs perform an annual review and assessment. Regular reviews help ensure that DCMs and SEFs routinely evaluate whether swaps previously determined to be available to trade should continue to be treated in that manner. Thus, in conducting this review and assessment, the proposal would require a SEF or DCM to consider the factors in §§ 37.10(b) or 38.12(b), respectively. The Commission would also encourage DCMs and SEFs, in conducting this review and assessment, to evaluate their swaps that have not been determined to be available to trade and to submit them to the Commission as appropriate. Upon completion of the annual review, a DCM or SEF would be required to provide electronically to the Commission a report of such review and assessment, including any supporting information or data, no later than 30 days after its fiscal year end.

5. Notice to the Public of Available to Trade Determinations

a. Comments Regarding Notice to the Public

Some commenters to the SEF NPRM requested that the Commission provide notice to market participants that a swap is available to trade.⁵⁶ One commenter, for example, suggested that the Commission provide public notice that a swap will be deemed available to trade and on which platform(s).⁵⁷ Another commenter stated that “[w]ithout a notification system, market participants may not know to cease over-the-counter transactions in these swaps, stifling compliance with applicable rules.”⁵⁸

⁵⁶ E.g., Letter from Dexter Senft, Morgan Stanley, dated Mar. 2, 2011 at 4; Letter from Timothy Cameron, Securities Industry and Financial Markets Association Asset Management Group, dated Mar. 8, 2011 at 12; Letter from Wayne Pestone, FX Alliance Inc., dated Nov. 4, 2011 at 9-10.

⁵⁷ Letter from Dexter Senft, Morgan Stanley, dated Mar. 2, 2011 at 4.

b. Public Notice

In consideration of the comments received, the Commission notes that there is a process for notifying the public that a DCM or SEF has made a swap available to trade. Sections 40.5 and 40.6 of the Commission's regulations require DCMs and SEFs to post a notice and a copy of rule submissions on their website concurrent with the filing of the submissions with the Commission.⁵⁹ The Commission, consistent with current practice, will also post DCM and SEF rule submission filings on its website. The Commission is currently assessing the feasibility of posting notices of all swaps that are determined to be available to trade on an easily accessible page on its website.

6. Effective Date of Available to Trade Determinations

a. Comments Regarding Effective Date

Commenters to the SEF NPRM requested a waiting period before the effective date of the available to trade determinations or before imposing the trade execution requirement under CEA Section 2(h)(8) so that other SEFs have adequate time to list or offer the swap or any economically equivalent swap for trading.⁶⁰ These commenters stated that a reasonable waiting period will promote competition among SEFs by reducing a SEF's first-mover advantage.⁶¹ For example, the waiting period would allow

⁵⁸ Letter from Timothy Cameron, Securities Industry and Financial Markets Association Asset Management Group, dated Mar. 8, 2011 at 12.

⁵⁹ See Sections 40.5(a)(6) and 40.6(a)(2).

⁶⁰ Letter from Kevin Budd and Todd Lurie, MetLife, dated Mar. 8, 2011 at 4; Letter from Dexter Senft, Morgan Stanley, dated Mar. 2, 2011 at 4; Letter from Stuart Kaswell, Managed Funds Association, dated Mar. 8, 2011 at 3. Some of these commenters requested that the Commission establish a waiting period after the available to trade determination and before the trade execution requirement becomes effective.

⁶¹ Letter from Kevin Budd and Todd Lurie, MetLife, dated Mar. 8, 2011 at 4; Letter from Dexter Senft, Morgan Stanley, dated Mar. 2, 2011 at 4; Letter from Stuart Kaswell, Managed Funds Association, dated Mar. 8, 2011 at 3.

other SEFs additional time to build the required connectivity.⁶² A waiting period would also allow market participants the opportunity to make any related technological and trading strategy amendments.⁶³

b. Effective Date

In response to commenters who requested a waiting period before the effective date of a determination that a swap is available to trade or before imposing the trade execution requirement under CEA Section 2(h)(8), the Commission has issued a notice of proposed rulemaking that proposes a schedule to phase in compliance with the trade execution requirement under CEA Section 2(h)(8).⁶⁴ Under that proposed rulemaking, a swap transaction shall be subject to the CEA Section 2(h)(8) trade execution requirement upon the later of the following: (1) the applicable deadline established under the compliance schedule for the clearing requirement or (2) 30 days after the swap is first made available to trade on either a SEF or DCM.⁶⁵

C. Comment Requested

The Commission requests and will consider comments only on proposed regulations §§ 37.10 and 38.12. The Commission may consider alternatives to the proposed regulations and is requesting comment on the following questions:

- Should the Commission allow a SEF or DCM to submit its available to trade determination with respect to a group, category, type, or class of swaps based on the

⁶² Letter from Stuart Kaswell, Managed Funds Association, dated Mar. 8, 2011 at 3.

⁶³ Letter from Kevin Budd and Todd Lurie, MetLife, dated Mar. 8, 2011 at 4.

⁶⁴ See Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sep. 20, 2011). Comments to this notice of proposed rulemaking were due by November 4, 2011.

⁶⁵ Id.

factors in §§ 37.10(b) or 38.12(b)? How should the Commission define group, category, type, or class of swaps?

- Is the Commission's proposed approach in §§ 37.10(b) and 38.12(b) regarding the determination that a swap is available to trade appropriate? If not, what approach is appropriate and why? Should a SEF or DCM consider total open interest and notional outstanding for similar tenors in §§ 37.10(b) and 38.12(b)?

- In evaluating the factors under proposed §§ 37.10(b) and 38.12(b), should the Commission allow a SEF or DCM to consider the same swap or an economically equivalent swap on another SEF or DCM? What are the advantages and disadvantages of such an approach? Should a SEF or DCM consider the amount of activity in the same swap or an economically equivalent swap available primarily or solely in bilateral transactions?

- Should the Commission allow a SEF or DCM to submit an available to trade determination under §§ 37.10(a) or 38.12(a), if such SEF or DCM does not itself list the subject swap for trading? If so, in evaluating the factors under §§ 37.10(b) or 38.12(b), should the Commission allow the SEF or DCM to consider the same swap or an economically equivalent swap on another SEF or DCM? What are the advantages and disadvantages of such an approach? Should a SEF or DCM consider the amount of activity in the same swap or an economically equivalent swap available primarily or solely in bilateral transactions?

- When a DCM or SEF makes a swap available to trade, should all other DCMs and SEFs listing or offering for trading such swap and/or any economically equivalent swap be required to make those swaps available to trade? What would be the economic impact

on those DCMs and SEFs that would be required to make same swaps and/or economically equivalent swaps available to trade?

- If a SEF or DCM is required to make an economically equivalent swap available to trade, should that SEF or DCM be required to submit, under part 40 procedures, its reasoning for deciding that a certain swap is or is not economically equivalent to another swap? Should a SEF or DCM be required to consider the factors under §§ 37.10(b) or 38.12(b)? Should a SEF or DCM be able to use the factors under §§ 37.10(b) or 38.12(b) to submit to the Commission for consideration that an economically equivalent swap should not be subject to the requirement under §§ 37.10(c)(1) or 38.12(c)(1)? Should a DCM or SEF provide the Commission notice that an economically equivalent swap has been made available to trade? If so, should the Commission provide notice to the public? If so, how? How would market participants conducting bilateral transactions know that an economically equivalent swap has been made available to trade?

- Is the Commission's proposed definition of the term "economically equivalent swap" appropriate? If not, how should the Commission revise the definition as applicable to proposed §§ 37.10 and 38.12 and why? Are there other factors that the Commission should consider when defining the term economically equivalent swap? Should the Commission require that DCMs and SEFs consider specific material pricing terms? If so, what terms and why? For instance, should DCMs and SEFs consider same tenor or same underlying instrument? Should the Commission or DCMs and SEFs make the determination of which swaps are economically equivalent?

- Is the Commission's proposal that DCMs and SEFs conduct reviews and assessments appropriate? If not, what is appropriate and why?

- Should the Commission specify a process whereby a swap that has been determined to be available to trade may be determined to no longer be available to trade? If so, should the Commission use the rule submission procedure under part 40 for this process and why? Please explain the details of this approach, including who would make the determination that a swap is no longer available to trade. Should such a determination apply to all DCMs and SEFs universally or should it only apply to the particular DCM or SEF that seeks to no longer make a swap available to trade? What are the advantages and disadvantages of such approach? If the Commission should not specify a process to no longer make a swap available to trade, please explain why.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.⁶⁶ The Commission previously determined that DCMs and SEFs are not “small entities” for purposes of the RFA.⁶⁷ In determining that these registered entities are not “small entities,” the Commission reasoned that it designates a contract market or registers a SEF only if the entity meets a number of specific criteria, including the expenditure of sufficient resources to establish and maintain an adequate self-regulatory program.⁶⁸ Because DCMs and SEFs are required to demonstrate compliance with Core Principles,

⁶⁶ 5 U.S.C. 601 et seq.

⁶⁷ See 17 CFR part 40 Provisions Common to Registered Entities, 75 FR 67282 (Nov. 2, 2010); see also 47 FR 18618, 18619 (Apr. 30, 1982) and 66 FR 45604, 45609 (Aug. 29, 2001).

⁶⁸ See, e.g., Core Principle 2 applicable to DCMs under Section 735 of the Dodd-Frank Act and Core Principle 2 applicable to SEFs under Section 733 of the Dodd-Frank Act.

including principles concerning the maintenance or expenditure of financial resources, the Commission previously determined that SEFs, like DCMs, are not “small entities” for the purposes of the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities. The Commission invites public comment on this determination.

B. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”)⁶⁹ imposes certain requirements on federal agencies in connection with conducting or sponsoring any collection of information as defined by the PRA. The Commission may not conduct or sponsor, and a registered entity is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (“OMB”) control number. This proposed rulemaking will result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collection of information is “Parts 37 and 38 – Process for a Swap Execution Facility or Designated Contract Market to Make a Swap Available to Trade.” The OMB has not yet assigned this collection a control number.

Many of the responses to this new collection of information are mandatory. The Commission protects proprietary information according to the Freedom of Information Act and 17 CFR part 145, “Commission Records and Information.” In addition, Section

⁶⁹ 44 U.S.C. 3501 et seq.

8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.”⁷⁰ The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.⁷¹

1. Information Provided by Reporting Entities/Persons

The proposed regulations require SEFs and DCMs to collect and submit to the Commission information concerning available to trade determinations pursuant to §§ 37.10 and 38.12. For instance, SEFs and DCMs must submit available to trade determinations to the Commission as rules under part 40 pursuant to proposed §§ 37.10(a) and 38.12(a). SEFs and DCMs must also submit annual reports to the Commission pursuant to proposed §§ 37.10(d) and 38.12(d).

The Commission has estimated the final information collection burdens on DCMs and SEFs below. These estimates account for the following: (1) the number of respondents; and (2) the average hours required to produce each response. The Commission estimates that 50 registered entities will be required to file rule submissions and annual reports.

SEFs and DCMs must submit available to trade determinations to the Commission as rules under part 40 pursuant to proposed §§ 37.10(a) and 38.12(a). The Commission previously estimated the hourly burdens for DCMs and SEFs to comply with part 40. While the Commission has no way of knowing the exact hourly burden upon a registered entity prior to implementation of the regulations governing that

⁷⁰ 7 U.S.C. 12(a)(1).

⁷¹ 5 U.S.C. 552a.

registered entity, the Commission estimates that the burden for a SEF or DCM under proposed §§ 37.10(a) and 38.12(a) will be similar to the previously estimated hours of burden under part 40 – 2.00 hours. However, the Commission notes that DCMs and SEFs would have to review certain factors and data (if applicable) to make a swap available to trade so these submissions may take additional time. Therefore, the Commission estimates that the hourly burden for a SEF or DCM under proposed §§ 37.10(a) and 38.12(a) will be as follows:

Estimated number of respondents: 50.

Estimated average hours per response: 8.00.

The Commission recognizes that DCMs and SEFs may submit several rule submission filings per year. At this time, it is not feasible to estimate the number of rule submission filings per year, on average, per DCM or SEF as the number of swap contracts that will be traded on a DCM or SEF and the number of those swaps that a DCM or SEF will determine to make available to trade is presently unknown.

Proposed §§ 37.10(d) and 38.12(d) require SEFs and DCMs to submit annual reports, including any supporting information and data, to the Commission of their review and assessment of the swaps they made available to trade. The Commission previously estimated the number of filings and the hourly burdens for submissions by each DCO regarding swaps that they plan to accept for clearing under Section 39.5.⁷² The Commission estimated that each DCO will submit to the Commission one filing annually for the swaps that they plan to accept for clearing. While the Commission has no way of knowing the exact hourly burden upon a registered entity prior to

⁷² See Process for Review of Swaps for Mandatory Clearing, 76 FR 44464 (Jul. 26, 2011).

implementation of the regulations governing that registered entity, the Commission estimates that the burden for a SEF or DCM under proposed §§ 37.10(d) and 38.12(d) will be similar to the previously estimated hours of burden under Section 39.5 – 40.00 hours. The Commission estimates the burden for SEFs and DCMs under proposed §§ 37.10(d) and 38.12(d) as follows:

Estimated number of respondents: 50.

Annual responses by each respondent: 1.

Estimated average hours per response: 40.

Aggregate annual reporting burden hours (for all respondents): 2,000.

The Commission invites public comment on the accuracy of its estimate of the collection requirements that would result from the proposed regulations.

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on the information collection requirements proposed in this Notice. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the estimated burden of the proposed information collection requirements, including the degree to which the methodology and the assumptions that the Commission employed were valid; (3) determine whether there are ways to enhance the quality, utility, or clarity of the information proposed to be collected; and (4) minimize the burden of the proposed collections of information on DCMs and SEFs, including through the use of appropriate automated, electronic, mechanical, or other

technological information collection techniques, e.g., permitting electronic submission of responses.

The public and other federal agencies may submit comments directly to the Office of Information and Regulatory Affairs, OMB, by fax at (202) 395-6566 or by e-mail at OIRAsubmission@omb.eop.gov. Please provide the Commission with a copy of submitted comments so that they can be summarized and addressed in the final rule. Refer to the Addresses section of this Notice for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Therefore, a comment to OMB is best assured of receiving full consideration if OMB (and the Commission) receives it within 30 days of publication of this Notice. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed regulations.

C. Consideration of Costs and Benefits

In this section, the Commission addresses the costs and benefits of its proposed regulations and also considers the five broad areas of market and public concern under Section 15(a) of the CEA⁷³ within the context of the proposed regulations.

In this Notice, the Commission considers the costs and benefits that result from the regulations proposed herein; these costs and benefits are in addition to the costs and benefits associated with the SEF NPRM as previously proposed. In other words, the Commission is only considering the discrete costs and benefits of the regulations

⁷³ 7 U.S.C. 19(a).

specifically proposed in this Notice. To this end, the Commission solicits comments only on the costs and benefits of the proposed requirements herein; only comments pertaining to these cost and benefit issues will be considered as part of this Notice.

1. Costs of Proposed Regulations

The Commission anticipates that the proposed regulations will result in some additional operational and monitoring costs to DCMs and SEFs. The Commission requests commenters provide quantitative estimates of the additional costs and benefits to DCMs and SEFs from this Notice.

Under these proposed regulations, DCMs and SEFs may incur additional costs in undertaking evaluations of whether a swap is available to trade and submitting to the Commission their determinations with respect to such swaps as rule submission filings pursuant to the procedures under part 40 of the Commission's regulations. Proposed §§ 37.10(b) and 38.12(b) require SEFs and DCMs to consider certain factors to make a swap available to trade. Proposed §§ 37.10(a) and 38.12(a) require SEFs and DCMs to submit to the Commission their determinations with respect to those swaps that they make available to trade as a rule pursuant to the procedures under part 40 of the Commission's regulations.

The above-described assessment and submission may be performed internally by one compliance personnel of the DCM or SEF. The Commission estimates that it would take the compliance personnel approximately eight hours, on average, to assess and submit the available to trade determination per rule submission filing. The compliance personnel would have to, for example, consider factors to make a swap available to trade and write a cover submission to the Commission, including a description of the swap or

swaps that are covered and an explanation and analysis of the available to trade determination. The Commission notes that this is a general estimate and that it is difficult to determine with reasonable precision the number of hours involved given the novelty of this available to trade process. The Commission estimates the cost per hour for one compliance personnel to be \$43.25 per hour.⁷⁴ Therefore, the Commission estimates that it would cost each DCM and SEF an additional \$346.00 per rule submission filing to comply with the proposed requirements.

Certain additional factors may affect the cost estimates noted above. For example, swaps with complex terms and conditions or requests for additional information or questions from Commission staff regarding the available to trade determination may result in higher costs.

The Commission also recognizes that DCMs and SEFs may submit several rule submission filings per year. At this time, it is not feasible to estimate the number of rule submission filings per year per DCM or SEF as the number of swap contracts that will be traded on a DCM or SEF and the number of those swaps that a DCM or SEF will determine to make available to trade is presently unknown.

Under proposed §§ 37.10(c) or 38.12(c), if a SEF or DCM makes a swap available to trade, all SEFs and DCMs listing or offering such swap and/or any economically equivalent swap, shall make those swaps available to trade for purposes of Section 2(h)(8) of the CEA. Further, such contracts may not be traded on a bilateral

⁷⁴ See Report on Management & Professional Earnings in the Securities Industry 2010, Securities Industry and Financial Markets Association at 4 (Sep. 2010). The report lists the average total annual compensation for a compliance specialist (intermediate) as \$59,878. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

basis. In order to comply with this requirement, DCMs, SEFs, and market participants would have to monitor and identify those contracts that are either the same or economically equivalent to that swap made available to trade. At this time, it is not feasible to estimate the number of hours involved given the novelty of the available to trade process.

The Commission seeks comment on all aspects of the cost estimates provided above. Specifically, the Commission seeks comment on the period of time, the number and type of personnel, and the cost estimates for DCMs and SEFs to comply with the assessment process as described above. The Commission also seeks comment on the number of hours per year, on average, that a SEF or DCM will spend monitoring and evaluating swap contracts in order to comply with proposed §§ 37.10(c) and 38.12(c).

Proposed § 38.12(d) would require DCMs to incur additional costs to conduct an annual review and assessment of each swap it has made available to trade and submit its review and assessment to the Commission.⁷⁵ This assessment may be performed internally by one compliance personnel of the DCM. The Commission estimates that it would take the compliance personnel approximately 40 hours, on average, to conduct this review and assessment. The Commission notes that this is a general estimate and that it is difficult to determine with reasonable precision the number of hours involved given the novelty of this process. As noted above, the Commission estimates the cost per hour for one compliance personnel to be \$43.25 per hour. Therefore, the Commission estimates that it would cost each DCM an additional \$1,730.00 per review to comply with the proposed requirements.

2. Benefits of Proposed Regulations

⁷⁵ The SEF NPRM imposed a review and assessment process for SEFs.

The proposed regulations are expected to provide needed certainty for DCMs, SEFs, and market participants for the available to trade process. The proposed regulations, for example, set forth the procedure to make a swap available to trade, the factors to consider in making a swap available to trade, and visibility into which swaps are available to trade. Additionally, the proposed regulations are expected to promote the trading of swaps on DCMs and SEFs and promote competition among these entities. DCMs and SEFs, who may be most familiar with the trading of swaps, would make swaps available to trade based on factors specified by the Commission. DCMs and SEFs have discretion to consider any one factor or several factors to make a swap available to trade. These aspects of the proposed regulations are intended to facilitate DCMs and SEFs to make swaps available to trade, which is expected to promote the trading of swaps on DCMs and SEFs and competition among these entities. Finally, the proposed regulations are expected to promote price discovery because those swaps that DCMs and SEFs make available to trade would effectively be subject to the trade execution requirement, which would require them to trade solely on DCMs and SEFs.

The Commission seeks comment on all aspects of the benefits of its proposed regulations in this Notice.

3. Section 15(a) Discussion

Section 15(a) of the CEA⁷⁶ requires the Commission to consider the costs and benefits of its action before promulgating a regulation under the CEA. Section 15(a) of the CEA specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (a) protection of market participants and the public;

⁷⁶ 7 U.S.C. 19(a).

(b) efficiency, competitiveness and financial integrity of futures markets; (c) price discovery; (d) sound risk management practices; and (e) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.⁷⁷

a. Protection of market participants and the public

The proposed regulations are intended to provide certainty for DCMs, SEFs, and market participants for the available to trade process. Under the proposed regulations, a SEF or DCM must consider certain factors specified by the Commission under Sections 37.10(b) or 38.12(b), respectively, to make a swap available to trade. A DCM or SEF must also submit available to trade determinations to the Commission, either for approval or under certification procedures, pursuant to the rule filing procedures of part 40 of the Commission's regulations. Part 40 also requires DCMs and SEFs to post a notice and a copy of rule submissions on their website concurrent with the filing of the submissions with the Commission. The Commission, consistent with current practice, will also post DCM and SEF rule submission filings on its website. Therefore, under the proposed regulations, DCMs, SEFs, and market participants would know the factors to consider in making a swap available to trade, the procedure to make a swap available to trade, and the swaps that are available to trade, which provides certainty to the available to trade

⁷⁷ See, e.g., Fisherman's Doc Co-op., Inc v. Brown, 75 F.3d 164 (4th Cir. 1996); Center for Auto Safety v. Peck, 751 F.2d 1336 (D.C. Cir. 1985) (noting that an agency has discretion to weigh factors in undertaking cost-benefit analysis).

process. This certainty also promotes the protection of market participants by ensuring that there is transparency in the available to trade process.

The proposed regulations are also expected to promote the protection of market participants and the public by providing for Commission review and oversight and public participation. Under the proposed regulations, the Commission would either approve or review the DCM's or SEF's available to trade determination. To facilitate this approval or review, the proposed regulations require DCMs and SEFs to provide the Commission with a brief explanation of any substantive opposing views in rule filings and, if the Commission extends the rule review period under the self-certification procedure, then there will be a 30-day public comment period. These aspects of the proposed regulations are expected to provide appropriate oversight, and may increase the transparency, of DCM and SEF available to trade determinations. This oversight and transparency is expected to increase the likelihood that all important issues will be identified and weighed by the Commission, which may protect market participants and the public.

b. Efficiency, competitiveness, and financial integrity of the markets

The proposed regulations are expected to promote the trading of swaps on DCMs and SEFs and promote competition among these entities. DCMs and SEFs, who may be most familiar with the trading of swaps, would make swaps available to trade based on factors specified by the Commission. DCMs and SEFs would have discretion to consider any one factor or several factors to make a swap available to trade. These aspects of the proposed regulations are intended to facilitate DCMs and SEFs to make swaps available to trade, which is expected to promote the trading of swaps on DCMs and SEFs and competition among these entities. Additionally, the requirement that DCMs and SEFs

must make the same swap and any economically equivalent swap available to trade may increase the number of swaps trading on DCMs and SEFs, which is expected to promote the trading of swaps on DCMs and SEFs.

c. Price discovery

As mentioned above, the proposed regulations are expected to promote the trading of swaps on DCMs and SEFs. Those swaps that DCMs and SEFs make available to trade could be subject to the trade execution requirement. These swaps would be required to trade solely on DCMs and SEFs, which would promote price discovery.

d. Sound risk management practices

The proposed regulations are not expected to affect sound risk management practices.

e. Other public interest considerations

The proposed regulations are not expected to affect public interest considerations other than those identified above.

The Commission specifically invites public comment on its application of the criteria contained in Section 15(a) of the CEA and further invites interested parties to submit any data, quantitative or qualitative, that they may have concerning the costs and benefits of the proposed regulations.

List of Subjects

17 CFR Part 37

Registered entities, Reporting and recordkeeping requirements, Swap execution facilities, Swaps.

17 CFR Part 38

Designated contract markets, Registered entities, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, the Commission proposes to amend 17 CFR parts 37 and 38 as follows:

PART 37 – SWAP EXECUTION FACILITIES

1. The authority citation for part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a-2, 7b-3 and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

2. The heading of part 37 is revised to read as set forth above.

3. Add new § 37.10 to read as follows:

§ 37.10 Process for a swap execution facility to make a swap available to trade.

(a) Required submission. A swap execution facility that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap pursuant to the procedures under part 40 of this chapter.

(b) Factors to consider. To make a swap available to trade, for purposes of Section 2(h)(8) of the Commodity Exchange Act, a swap execution facility shall consider, as appropriate, the following factors with respect to such swap:

- (1) Whether there are ready and willing buyers and sellers;
- (2) The frequency or size of transactions on swap execution facilities, designated contract markets, or of bilateral transactions;
- (3) The trading volume on swap execution facilities, designated contract markets, or of

bilateral transactions;

(4) The number and types of market participants;

(5) The bid/ask spread;

(6) The usual number of resting firm or indicative bids and offers;

(7) Whether a swap execution facility's trading system or platform will support trading in the swap; or

(8) Any other factor that the swap execution facility may consider relevant.

(c) Economically equivalent swap. (1) Upon a determination that a swap is available to trade, all other swap execution facilities and designated contract markets listing or offering for trading such swap and/or any economically equivalent swap, shall make those swaps available to trade for purposes of Section 2(h)(8) of the Commodity Exchange Act.

(2) For purposes of this section, the term "economically equivalent swap" means a swap that the swap execution facility or designated contract market determines to be economically equivalent with another swap after consideration of each swap's material pricing terms.

(d) Annual review. (1) A swap execution facility shall conduct an annual review and assessment of each swap it has made available to trade to determine whether or not each swap should continue to be available to trade. The annual review shall be conducted at the swap execution facility's fiscal year end.

(2) When conducting its review and assessment pursuant to paragraph (d)(1) of this section, a swap execution facility shall consider the factors specified in paragraph (b) of this section.

(3) The swap execution facility shall provide electronically to the Commission a report of its review and assessment, including any supporting information or data, not more than 30 days after the swap execution facility's fiscal year end.

PART 38 – DESIGNATED CONTRACT MARKETS

4. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a-2, 7b, 7b-1, 7b-3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

5. Add new § 38.12 to read as follows:

§ 38.12 Process for a designated contract market to make a swap available to trade.

(a) Required submission. A designated contract market that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap pursuant to the procedures under part 40 of this chapter.

(b) Factors to consider. To make a swap available to trade, for purposes of Section 2(h)(8) of the Commodity Exchange Act, a designated contract market shall consider, as appropriate, the following factors with respect to such swap:

- (1) Whether there are ready and willing buyers and sellers;
- (2) The frequency or size of transactions on designated contract markets, swap execution facilities, or of bilateral transactions;
- (3) The trading volume on designated contract markets, swap execution facilities, or of bilateral transactions;
- (4) The number and types of market participants;

(5) The bid/ask spread;

(6) The usual number of resting firm or indicative bids and offers;

(7) Whether a designated contract market's trading facility will support trading in the swap; or

(8) Any other factor that the designated contract market may consider relevant.

(c) Economically equivalent swap. (1) Upon a determination that a swap is available to trade, all other designated contract markets and swap execution facilities listing or offering for trading such swap and/or any economically equivalent swap, shall make those swaps available to trade for purposes of Section 2(h)(8) of the Commodity Exchange Act.

(2) For purposes of this section, the term "economically equivalent swap" means a swap that the designated contract market or swap execution facility determines to be economically equivalent with another swap after consideration of each swap's material pricing terms.

(d) Annual review. (1) A designated contract market shall conduct an annual review and assessment of each swap it has made available to trade to determine whether or not each swap should continue to be available to trade. The annual review shall be conducted at the designated contract market's fiscal year end.

(2) When conducting its review and assessment pursuant to paragraph (d)(1) of this section, a designated contract market shall consider the factors specified in paragraph (b) of this section.

(3) The designated contract market shall provide electronically to the Commission a report of its review and assessment, including any supporting information or data, not more than 30 days after the designated contract market's fiscal year end.

Issued in Washington, DC, on December 5, 2011, by the Commission.

David A. Stawick,
Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations

Appendices to Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade—Commissioners Voting Summary and Statements of Commissioners

Appendix 1—Commissioners Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O'Malia and Wetjen voted in the affirmative; Commissioner Sommers voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule to implement a process for designated contract markets (DCMs) and swap execution facilities (SEFs) to make a swap “available to trade.” The Dodd-Frank Wall Street Reform and Consumer Protection Act requires that swaps subject to the clearing requirement be traded on a DCM or SEF, unless no DCM or SEF makes the swap available to trade or the swap transaction is subject to the end-user exception. This proposal will bring transparency to the process for making a swap available to trade on a DCM or SEF. It also will provide appropriate oversight of the process through Commodity Futures Trading Commission review.

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